IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FRANCIS H. AZUR,	)	
	)	
Plaintiff,	)	Civil Action No. 06-1047
	)	
v.	)	Chief Judge Ambrose
	)	Magistrate Judge Caiazza
MBNA CORPORATION,	)	
	)	
Defendant.	)	

OPINION AND ORDER

I. OPINION

For the reasons that follow, the Defendant's Motion to compel arbitration (Doc. 6) will be granted, and this case will be stayed under the Federal Arbitration Act, 9 U.S.C. § 3.

The legal issues presented by the Defendant's Motion are summarized in the magistrate judge's Orders granting the Plaintiff limited, expedited discovery. In relevant part, the first decision stated:

> In this federal Truth in Lending Act case, the Plaintiff Francis H. Azur seeks to recover charges fraudulently made by his former executive assistant Michele Vanek ('Ms. Vanek') to an MBNA credit card issued in his name. . . . The Defendant argues that, pursuant to an arbitration clause added to his credit card agreement in December 1999, the Plaintiff must proceed to arbitration on his claims. . . .
>
> The Defendant asserts that this matter is governed by the Federal Arbitration Act and that, presuming Mr. Azur agreed to the arbitration clause, it is a valid and binding provision. Plaintiff's counsel do not meaningfully refute these assertions, which otherwise are supported in the law. . . .

Rather, the Plaintiff resists the Defendant's Motion largely on evidentiary grounds. . . .

[For good cause shown,] the Plaintiff [was] permitted to take limited, expedited discovery to address the specific issues of when [his] account ending in 1389 was opened, and whether the 1999 notice of amendment related to that account. Discovery [was] so limited because, if account 1389 was opened before Ms. Vanek began working for the Plaintiff and the 1999 arbitration amendment related to that account, . . . the Plaintiff [is] bound to arbitration.

Establishing that account 1389 was created in 1986 will put to bed the Plaintiff's suggestion that Ms. Vanek opened [it]. . . . If the 1999 amendment notice related to account 1389, moreover, Mr. Azur is presumed to have received the notice and his failure to opt out renders the provision enforceable. . . .

The Defendant has put forth evidence that notice of the amendment was mailed to Mr. Azur and not returned as undelivered. . . . [I]t is well settled that evidence of proper mailing gives rise to a rebuttable presumption of receipt, and [a]ctual receipt need not be proven where circumstantial evidence, [such as] evidence of [the sender's] customary mailing practices, establishes [the] same . . . .

By implication, Mr. Azur admits that he cannot refute the Defendant's evidence of mailing through anything other than speculation. [Specifically, the Plaintiff's Opposition Brief states that,] assuming [the] 1999 amendment was sent to Mr. Azur, it would have [been] intercepted by Ms. Vanek . . . . Plaintiff's counsel, moreover, has failed to identify legal authority showing that Mr. Azur's having authorized Ms. Vanek to open his mail somehow relieves him of the presumption the amendment notice was received. . . . If such precedent exists, it would be surprising indeed.

M.J.'s Opinion & Order dated Jan. 10, 2007 (Doc. 21) at 1-2, 4-6 (footnotes, some internal quotations, and citations to record and applicable law omitted).

The parties' initial discovery cleared up some ambiguity regarding the assignment of multiple MBNA account numbers to Mr. Azur:

> [T]he Defendant initially stated that Mr. Azur [has] held one [MBNA] . . . credit card account, account number 5490 9916 6626 1389[,] since 1986. . . . MBNA[, however,] did little to explain why its documentation revealed at least three account numbers, ones ending in 1389, 7854, and 1521. . . .
>
> [T]he Defendant [has recently shown, though, that] . . . . Mr. Azur has had only one credit card account with MBNA . . ., which was opened on August 14, 1986 . . . . [under an] account number ending in '7854.'
>
> The account received a product upgrade on August 2, 2003, which resulted in it being assigned a new account number ending in '1389.' The old number was simply overlaid by the new number on the same account.
>
> On March 8, 2006, the account was assigned a new number ending in '1521,' in response to Mr. Azur's fraud claim. . . .
>
> Counsel . . . asserts that the product upgrade in August 2003 is insignificant, as the Defendant's sworn statements establish that MBNA's 1999 arbitration amendment was sent to <u>all</u> [account] holders then existing. . . .
>
> Again, the Defendant has made a fairly compelling case that Mr. Azur is bound to arbitration. And while MBNA's more recent clarifications are largely consistent with its previous explanations, its lack of prior

> clarity arguably has left the Plaintiff at a disadvantage in resisting the Defendant's Motion to compel arbitration. . . .

M.J.'s Order dated Apr. 24, 2007 (Doc. 27) at 2-3 (footnotes, some internal quotations, and citations to record and applicable law omitted).

Further discovery was permitted, but it was limited in scope to: (a) the nature of the August 2003 product upgrade and whether it contained new terms and conditions or dispute resolution procedures; and (b) the Defendant's sworn statement that the 1999 arbitration amendment was sent to all then-existing account holders. *Id.* at 3. The additional discovery has been taken, and the parties have filed supplemental briefing and evidentiary materials. *See* Docs. 28 & 29.

The Defendant finally has proven that the Plaintiff is bound to arbitration. Its evidentiary materials demonstrate that Mr. Azur has held only one account with MBNA, which was opened in 1986. *See* Aff. of M. Simpkins (Ex. A to Doc. 29) at ¶¶ 5-6 (citing attached evidentiary materials). In 1999, the Defendant mailed to all of its account holders an amendment adding the arbitration clause. *Id.* at ¶¶ 14-17. Mr. Azur's amendment was not returned as undelivered, *id.* at ¶ 18, and he cannot rebut the legal presumption he received it. *See* discussion *supra*; *see also id.* (noting Mr. Azur admits he cannot refute Defendant's evidence of mailing, having stated Ms. Vanek would have intercepted it).

There is no evidence that MBNA's product upgrade in August 2003, or its assignment of a new account number in March 2006, modified or deleted the arbitration provision. To the contrary, the Defendant has provided sworn statements, on personal knowledge, that the arbitration provision remained in full force. *See* Def.'s Responses to Pl.'s 2d Set of Interrogs. (filed under Ex. B to Doc. 29) at 3 (2003 upgrade "did not eliminate the requirement that Mr. Azur arbitrate his claims"; "[t]he terms of the cardholder's agreement continue notwithstanding the change in the identifying [account] number," whether occasioned by product upgrade or concerns regarding fraudulent charges); *see also id.* at 5 (Verification of Defendant's response, made under oath by MBNA agent Eric Pyle); Simpkins Aff. at ¶¶ 8-9 (for purposes of 2003 upgrade, "[t]he old [account] number was simply overlaid by the new number on the same account" and, "[w]hen a product is upgraded, . . . the terms of the cardholder agreement [continue to] apply").

The magistrate judge's analyses, which are adopted as those of the District Court, dictate that Mr. Azur is bound by the 1999 arbitration amendment. Nothing in the Plaintiff's original or supplemental filings demonstrates the contrary. Although counsel complains that MBNA has failed to "produce documentation reflecting what was sent to [the] Plaintiff" in connection with the 2003 upgrade, *see* Doc. 28 at 3, they have failed to show

under the law that the Defendant's sworn statements, on personal knowledge, are insufficient to establish the arbitration provision remained unaffected. Nor have they shown that Mr. Pyle's verification was required to "provide information concerning" his "title, credentials" and qualification to swear, on personal knowledge and under oath, that the 2003 upgrade did not eliminate the need for arbitration. *See id.*[1]

In sum, MBNA has demonstrated that Mr. Azur is bound by the 1999 arbitration provision. And though the Defendant requests a dismissal of the Plaintiff's case, *see* Def.'s Mot. at 9, Third Circuit law mandates a stay. *Compare* Lloyd v. Hovensa, LLC, 369 F.3d 263, 269 (3d Cir. 2004) ("a district court [has] no discretion to dismiss a case where one of the parties applies for a stay pending arbitration") *with* Pl.'s Opp'n Br. (Doc. 9) at 5 (requesting that, if Defendant's Motion to compel arbitration be granted, action be stayed).

For all of the reasons stated above, as well as those in the magistrate judge's prior rulings (which are adopted by the District Court and incorporated here by reference), the Court enters the following:

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[1] Notably, Affiant Simpkins also has sworn that the 2003 upgrade did not affect the arbitration provision. *See* discussion *supra*; *see also* Simpkins Aff. at ¶¶ 1-2 (identifying affiant as Vice President of entity doing business under name MBNA, and confirming her statements were made on personal knowledge).

II. ORDER

The Defendant's Motion to compel arbitration (**Doc. 6**) is **GRANTED**, and this case is **STAYED** under 9 U.S.C. § 3 until arbitration is had in accordance with the terms of the arbitration agreement. IT IS FURTHER ORDERED that this case is **ADMINISTRATIVELY CLOSED**.[2]

THESE THINGS ARE SO ORDERED on this 7th day of June, 2007.

Donetta W. Ambrose
Chief U.S. District Court Judge

cc (via email):

Kurt A. Miller, Esq.
Kevin L. Barley, Esq.
Kevin K. Douglass, Esq.
Joe N. Nguyen, Esq.
Perry A. Napolitano, Esq.
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[2] Administrative closings are a familiar, although *ad hoc*, manner in which courts remove cases from their active dockets without the entry of a final adjudication. *See* Corion v. Corp. v. Chen, 964 F.2d 55, 56-7 (1st Cir. 1992) (an order administratively closing a case is not a final, appealable order); *cf. also generally* Lloyd, 369 F.3d at 270 (under FAA § 16, "whenever a stay is entered under § 3, the party resisting arbitration is expressly denied the right to an immediate appeal") (footnote omitted).